No. 56774-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANE J. LEWIS, Individually and as Personal Representative of the Estate of RICHARD W. LEWIS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

The right of trial by jury shall remain inviolate.

Washington Constitution. art. 1, § 21.

Richard Lewis was diagnosed with mesothelioma in May 2018 and elected to exercise his constitutional right to seek legal redress against the asbestos companies who products caused his disease. Mr. Lewis died fifteen months later shortly after his lawsuit had settled. His wife, Diane Lewis, sought widows benefits under the Washington Industrial Insurance Act ("WIIA"). It is undisputed that Mr. Lewis sustained a compensable injury under the WIIA. Nevertheless, the Department of Labor & Industries ("Department") denied widows benefits because Mr. Lewis also qualified for benefits under the Longshore and Harbor Workers Compensation Act ("LHWCA" or "Longshore Act"), 33 U.S.C. § 901 *et seq*., but had extinguished his right to recover such benefits by settling his lawsuit. In short, because Mr. Lewis elected to exercise his

constitutional right prosecute a lawsuit during his lifetime, his widow has been denied benefits under the WIIA

It is undisputed that had Mr. Lewis been exposed to asbestos solely while working in nonmaritime employment, Diane Lewis would be entitled to WIIA benefits. It is also undisputed that had Mr. Lewis elected to forgo a lawsuit and file a LHWCA claim, he would never have received benefits during his lifetime and his claim would likely not be determined until after expiration of the three-year Statute of Limitations for personal injury claims. Nevertheless, the Department determined that Mr. Lewis' exercise of his constitutional right to prosecute a lawsuit during his lifetime foreclosed his widow's right to WIIA benefits after he died. The Department came to this decision without considering whether Mr. Lewis' Longshore claim would actually have been successful or capable of resolution before the Statute of Limitations expired.

The Department's decision violates the Washington Constitution by chilling the exercise of Richard and Diane Lewis' constitutional right to trial by jury. Richard Lewis faced of Hobson's Choice in which prosecution of a third-party action during his lifetime would forgo his wife's right to widows benefits after his death. Postponing prosecution of a third-party action pending adjudication of Mr. Lewis' Longshore claim would have indisputably deprived him of any recompense during his lifetime and precluded his widow from prosecuting a third-party claim within the Statute of Limitations potentially leaving her with no compensation in the likely event the Longshore claim was denied. The Washington Constitution does not permit the State to condition the right to WIIA benefits on an injured worker's waiver of his right to trial by jury or hold one worker who was employed in a shipyard for one day ineligible for benefits that a worker exposed solely on shore would receive.

Nor do our federal and State Constitutions permit unequal treatment of similarly situated citizens. The Department's policy treats Washington shipyard workers' differently than purely land-based workers in that it denies benefits to maritime workers who accept third-party settlements related to their workplace injury, while awarding benefits non-maritime workers who accept third-party settlements. No compelling—or even rational—reason exists for this distinction. Thus, the policy violates equal protection.

Further, the policy underlying the Department's denial of benefits contravenes basic principles of statutory interpretation. RCW 51.12.102, by its plain language, provides coverage to maritime workers who suffer from asbestos disease. Yet, the Department's policy applies this exception only to its award of temporary benefits while a worker's application for LHWCA benefits is pending. In addition, these benefits terminate regardless of whether the Longshore claim is accepted or denied. This policy is not supported by the text of the statute.

Finally, the constitutionality of the WIIA is premised on a "Grand Compromise" in which injured workers forgo their right to sue employers in exchange for "swift and certain" compensation for occupational injuries. Because the Department's interpretation of RCW 51.12.102 subordinated his right to eligibility for benefits under the WIIA to his qualification for benefits under a federal statute with different standards, the "swift and certain" relief on which the Grand Compromise is premised is illusory and constitutionally infirm.

Based on the constitutional infirmities and statutory misinterpretations set forth herein, the trial court's affirmance of the Department's denial of widow's benefits should be overturned.

II. ASSIGNMENTS OF ERROR

The trial court erred in denying Ms. Lewis' request to reverse the Department of Labor and Industries' decision and order denying all entitlement to benefits. Certified Appeal Board Record (CABR) 326

III. ISSUE PRESENTED

1. Does an interpretation of RCW 51.12.102 that forces terminally ill workers to elect between receiving benefits under WIIA or prosecuting a third-party claim during their lifetime chill the exercise of their right to trial by jury enshrined in Article 1, Section 21 of the Washington Constitution? (AE 1)

2. Does an interpretation of RCW 51.12.102 that permits the Department to deny WIIA benefits to qualifying asbestos victims with a single day of maritime employment who accept third party settlements, while granting benefits to asbestos victims with no maritime exposure who also accept third-party settlements, violate the equal protection requirements of the Washington and United States Constitutions? (AE 1)

3. Does an interpretation of RCW 51.12.102 that only provides temporary WIIA benefits to qualified workers with maritime exposure while their LHWCA claim is pending and

terminates those benefits if their Longshore claim is denied contravene the plain language of the statute? (AE 1)

4. Does an interpretation of RCW 51.12.102 that only provides temporary WIIA benefits to qualified workers with maritime exposure while their LHWCA claim is pending and terminate such benefits if their Longshore claim is denied violate the "Grand Compromise" on which the constitutionality of the WIIA is premised? (AE 1)

IV. STATEMENT OF THE CASE

A. Richard Lewis' Asbestos Exposure, Occupational Disease, and Civil Lawsuit

Richard Lewis was a career insulator and member of the International Association of Heat and Frost Insulators, Local 7.[1] For approximately one year as an apprentice insulator, Mr. Lewis performed work at Todd and Lockheed Shipyards that exposed him to asbestos.[2] For the next 30 years, Mr. Lewis

[1] CABR 387
[2] CABR 387

performed insulation work solely at land-based industrial facilities throughout Western Washington and was exposed to asbestos during this work.[3]

In May 2018, as a result of his occupational asbestos exposures, Mr. Lewis developed mesothelioma.[4] It is undisputed that both Mr. Lewis' shipyard and land-based exposures were each independently sufficient to cause his mesothelioma.[5]

On July 12, 2018, Richard and Diane Lewis filed a lawsuit in Pierce County Superior Court for personal injuries and loss of consortium arising from Mr. Lewis' mesothelioma diagnosis.[6] In their lawsuit, the Lewises named manufacturers of asbestos products that Mr. Lewis worked with and around, premises owners who failed to warn Mr. Lewis of asbestos hazards on their jobsites, and the manufacturer of a defective

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[3] CABR 387
[4] CABR 387
[5] CABR 387
[6] CABR 388

mask that failed to protect Mr. Lewis from asbestos inhalation. Based on Mr. Lewis' terminal diagnosis, the trial court set an expedited trial date of April 8, 2019, pursuant to RCW 4.44.025.[7] In the following months, some defendants were dismissed voluntarily, some prevailed at summary judgment, and some resolved with the Lewises through negotiated monetary settlements.

On April 8, 2019, the Lewises commenced trial against 3M Company, the sole remaining defendant. The case settled after jury selection and opening statements. On April 15, 2019, the Lewises notified the trial court of settlement with all parties.[8] Exactly four months later, Richard Lewis died at the age of 66.[9]

[7] CABR 388
[8] CABR 331
[9] CABR 387

Following her husband's death, Diane Lewis filed an application for widow's benefits on April 1, 2020.[10] The Department denied benefits, ruling as follows:

> It is determined that the death of Richard Lewis was due to mesothelioma, an asbestos related disease, resulting from past exposures to asbestos fibers in the course of employment.
>
> It has been determined that Mr. Lewis was exposed to asbestos in the shipyards, and therefore is considered a maritime worker, under maritime coverage.
>
> As a claim has not been filed with the Longshore and Harbor Worker's Compensation Act, and you have already recovered a third-party settlement, you do not qualify for coverage under RCW 51.12.102 and are barred by RCW 51.12.100.
>
> The application for death benefits filed by Diane Lewis is denied.[11]

B. Statutory Framework

This appeal concerns the interplay between the WIIA, and the LHWCA. The WIIA is meant to provide "sure and certain relief for workers, injured in their work, and their

[10] CABR 387
[11] CABR 326

families and dependents . . . regardless of questions of fault and to the exclusion of every other remedy . . .” against the employer. RCW 51.04.010. Disability resulting from occupational disease coverage is compensable pursuant to RCW 51.32.180, which provides that a worker suffering disability from an occupational disease “shall receive the same compensation benefits” as “provided for a worker injured or killed in employment.” RCW 51.32.180. RCW 51.08.140 defines occupational disease as “such disease or infection as arises naturally and proximately out of employment.” *See Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

The LHWCA is a federal workers’ compensation scheme that applies to maritime workers and covers workers who performed any work at a shipyard for any amount of time, no matter how brief. Under the LHWCA, a worker exposed to asbestos at a shipyard is eligible to apply for benefits. *See Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 118 P.3d 311 (2005)

(citing *Lindquist v. Dep't of Labor & Indus.*, 36 Wn. App. 646, 652, 677 P.2d 1134 (1984)). An award of benefits, however, is by no means guaranteed.

Originally, the WIIA expressly excluded workers eligible for LHWCA benefits from coverage even if they had also sustained compensable occupational injuries on land. RCW 51.12.100. In 1988, however, the legislature amended the WIIA to provide benefits to qualifying victims of asbestos disease who were also entitled to benefits under federal or maritime laws, subject to resolution of their federal claim.

> The department shall furnish the benefits provided under this title to any worker or beneficiary who may have a right or claim for benefits under the maritime laws of the United States resulting from an asbestos-related disease if (a) there are objective clinical findings to substantiate that the worker has an asbestos-related claim for occupational disease and (b) the worker's employment history has a prima facie indicia of injurious exposure to asbestos fibers while employed in the state of Washington in employment covered under this title. The department shall render a decision as to the liable insurer and shall continue to pay benefits until the liable insurer initiates payments or benefits are otherwise properly terminated under this title.

RCW 51.12.102(1). Under this amendment, workers exposed to asbestos in both maritime and land-based settings may recover under the WIIA unless and until LHWCA benefits are received.

Although the WIIA and the LHWCA both provide coverage to asbestos-exposed workers, they impose diametrically opposed consequences on injured claimants who prosecute third-party actions for compensable occupational injuries. The WIIA expressly permits and implicitly encourages injured workers to prosecute third-party actions for workplace injuries, subject only to the Department's right of subrogation. *See* RCW 51.24.030; RCW 51.24.060. Conversely, the LHWCA imposes draconian restrictions on workers' tort recoveries. The LHWCA's election of remedies provision requires that an injured worker obtain written approval from the responsible employer before settling with a third party. 33 U.S.C. § 933(g)(1). As set forth below, determining the responsible employer in a LHWCA claim

involving asbestos exposure is frequently contested and takes many years to resolve. Nevertheless, if a worker accepts settlements without obtained approval from the responsible employer "all rights to compensation and medical benefits under [the LHWCA] shall be terminated" even if the responsible employer has not been determined at the time the settlement is reached. 33 U.S.C. § 933(g)(2).

C. All Insulators in Washington are Subject to the LHWCA.

Virtually every union insulator in Western Washington has worked at a shipyard at some time in their career. Shipyard work currently represents about 20 percent of the insulation work in this territory but has historically been 50 percent or greater.[12] In fact, since the inception of the apprenticeship program in the 1960s, union insulators in Washington have been *required* by the terms of their apprenticeship to complete both shipyard and land-based work. Specifically, the program

[12] CABR 191

currently requires that 2240 of the 10,000 hours be spent in "Ship and Marine Work."[13]

During the hearing of this matter, the business manager for Local 7 of the insulators' union, Todd Mitchell, testified that the union has always required that a portion of an apprentice's training be in maritime work.[14] Mr. Mitchell also explained that Washington's Department of Labor and Industries certified the standards of the apprenticeship program and the delivery of that program to apprentices in this State.[15] Highlighting the point, Mr. Mitchell explained as follows:

> Q. [I]s it possible for an individual to attain journeyman status as an insulator without doing some work in a shipyard?
>
> A. No, it's not. This – Labor and Industries would find our – would find us in breach of our standards. And we wouldn't be able to . . . turn out our apprentices to journ[ey] level status if they didn't – if they weren't able to complete their time in the shipyards.[16]

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[13] CABR 374
[14] CABR 188
[15] CABR 187
[16] CABR 190

Mr. Lewis' coworker and fellow union member, Bill Duggins, agreed that it would be "pretty hard" for an insulator to go through their entire career without ever working in a shipyard.[17]

Mr. Duggins is a career member of Local 7 and testified that he has known "many" union insulators who have been diagnosed with asbestos disease, including asbestosis and mesothelioma.[18] And "many" of them have died from their asbestos disease.[19] Mr. Mitchell concurred, stating that his union has been "uniquely exposed to the dangers of asbestos."[20] In fact, he testified to the following:

> Q. And would it be accurate to say that there is no trade that has been more afflicted with asbestos disease than insulators?
>
> A. That would be very accurate.[21]

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[17] CABR 178
[18] CABR 178
[19] CABR 178
[20] CABR 194
[21] CABR 194

D. Mesothelioma Victims Face Insurmountable Barriers in Recovering Benefits under the LHWCA.

Unlike WIIA claims in which injured workers are given the benefit of the doubt, LHWCA claims are heavily-litigated. LHWCA claims are governed by the last responsible covered employer rule. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1285 (9th Cir. 1983). "The last covered employer rule means, plainly and simply, that the last employer covered by the LHWCA who causes or contributes to an occupational injury is completely liable for that injury." *Id*. at 1287. Claimants therefore have the burden of establishing where the last injurious shipyard exposure occurred. They must establish a prima facie case for each maritime employer in reverse chronological order. *Albina Engine & Machine v. Dir., OWCP.*, 627 F.3d 1293, 1301-02 (9th Cir. 2010).

During the administrative hearing of this matter, Ms. Lewis presented unrefuted expert testimony from Amie Peters, an attorney well-versed in Longshore litigation. Ms. Peters has been representing claimants in LHWCA cases for 15 years and

spends 75 percent of her time on such cases.[22] She chaired the Longshore Act group of the Workers' Injury Law & Advocacy Group from 2008 to 2016 and served as President of the organization from 2017 to 2018.[23] Over the course of her career, she has evaluated over 1,400 LHWCA cases and prosecuted over 1,000 claims.[24]

Ms. Peters testified that in LHWCA claims seeking compensation for asbestos disease, determining the responsible employer is an arduous, heavily-litigated, and often futile endeavor. She explained that for Washington union insulators, such as Richard Lewis—who worked for multiple employers and multiple job sites—there is no easy way to determine where the last maritime-related asbestos exposure occurred. The union, for instance, does not have records of Richard Lewis' (or any other insulators') jobsites, only records of his employers.[25]

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[22] CABR 205-06
[23] CABR 206-07
[24] CABR 208-09
[25] CABR 192-93

Nor does the union keep records of where Richard Lewis (or any other insulator) was exposed to asbestos.[26] Consequently, maritime employers typically deny responsibility and point a finger at a previous or subsequent employer as the last responsible employer.[27]

In mesothelioma cases, the challenge of determining the responsible employers is particularly significant. Given the 30- to 50- year latency period between asbestos exposure and mesothelioma diagnosis, the employment giving rise to a claimant's asbestos exposures occurs decades before symptoms manifest. Claimants often die within months of their mesothelioma diagnosis or are unable to accurately recall the asbestos exposures they sustained decades earlier. Importantly, it is not enough to simply know *where* an insulator worked; there must be evidence about *who* the insulator worked for, and

[26] CABR 193
[27] CABR 211-12

what he was doing. As a result, Ms. Peters testified, it could take years before the responsible employer is even identified.

> Q. How long after you first get an asbestos-caused Longshore Act claim started would you be able to determine the responsible employer, if it's possible?
>
> A. Traditionally I would say it takes me about two years to kind of home in on a last responsible employer and really be able to identify when I can really nail down somebody. Because it takes at least getting through a couple rounds of informal conference in the initial stages of discovery to say, yes, I have someone that I really think is the last responsible employer.[28]

Indeed, most Longshore attorneys decline asbestos cases because they are "very, very time intensive and very, very cost intensive."[29]

Ms. Peters reviewed Mr. Lewis' file and testified that any LHWCA claim filed on his behalf would have faced numerous challenges, including difficulty identifying the last responsible

[28] CABR 211
[29] CABR 211

employer.[30] Ms. Peters testified that in her opinion it would likely not have been possible to identify responsible employer and even if the employer was determined it would have taken years for Mr. Lewis' LHWCA claim to resolve:

> Q. Ms. Peters, have you from your review of Mr. Lewis's records been able to make an assessment about how long Mr. Lewis's case --Longshore case would have taken to be fully litigated?
>
> A. Well, number one, I'm not sure I would have taken Mr. Lewis's case because of some underlying factual problems with the case in finding that responsible employer. But if I had taken the case, this would have been one of the longer cases.
>
> Q. And what would you estimate then would be the length of the case?
>
> A. This case probably would have been on the three-to-five-year track total.[31]

Based upon her review of Mr. Lewis' file and her 15 years of experience prosecuting LHWCA claims on behalf of

[30] CABR 218-19
[31] CABR 218

asbestos victims, Ms. Peters opined that it would have been impossible to have resolved his claim during his lifetime and unlikely that the claim could have been adjudicated within the Statute of Limitations for third-party claims:

> Q. If Mr. Lewis had a viable Longshore claim and had filed that claim, what is the likelihood that would have been resolved within three years?
>
> A. It's hard to predict exactly what it would be. But likely it would not have been totally finished in three years.[32]

E. Washington Insulators Who File Lawsuits for Asbestos Disease are Denied Both WIIA and LHWCA Benefits.

Under the Department policy, widows claims involving workers who performed *any* maritime work during their careers are *never* eligible to receive permanent benefits under the WIIA. Under certain circumstances, the Department *may* award temporary WIIA benefits pursuant RCW 51.12.102 while the widow's Longshore claim is pending. However,

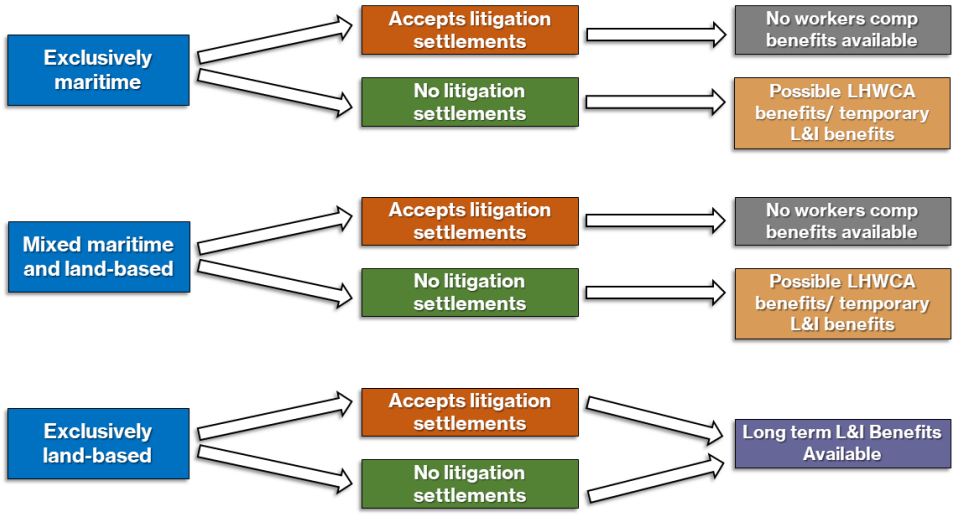
[32] CABR 219-20

under Department policy, once the LHWCA claim is resolved, WIIA benefits cease regardless of whether the claim was accepted or denied.[33] Thus, asbestos victims whose LHWCA claims are unsuccessful lose their right to benefits under the WIIA even if they sustained decades of asbestos exposure through shoreside employment.

Moreover, under Department policy if an asbestos disease victim who sustained even *one day* exposure in maritime employment accepts *any* litigation settlements before their LHWCA claim is resolved, the worker becomes immediately ineligible for any workers compensation benefits under RCW 51.12.102. On the other hand, as demonstrated by the chart below, Washington asbestos victims who performed no maritime work are eligible for long-term WIIA benefits

[33] *See* CABR 335, 341

regardless of whether they have accepted any third-party recoveries.[34]



Critically, in determining whether to award benefits pursuant to RCW 51.12.102(1), the Department does not consider whether the claimant will *actually* be able to overcome the many obstacles to recovering LHWCA benefits identified by Ms. Peters in her unrefuted testimony.[35] Rather, the

[34] The Department's witness agreed that this is the practical effect of the Department's application of RCW 51.12.102. CABR 254-55.
[35] CABR 258

Department simply determines whether workers are "eligible" to seek LHWCA benefits based on the fact of their shipyard work. The Department's representative explained:

> Q. [I]n determining whether or not an individual's shipyard exposure disqualifies them from the entitlement to benefits from the Department of Labor and Industries, you do not look at whether or not that individual will be successful in prosecuting her or his Longshore Act claim?
>
> A. No, I don't.
>
> Q. The sole basis for the Department's determination as to whether or not maritime employment disqualifies an individual from benefits is whether or not they worked in a shipyard, correct?
>
> A. Yeah, whether they worked in a shipyard or employed by a maritime employer.
>
> Q. And so, the actual ability of a claimant to successfully prosecute a Longshore Act claim for asbestos disease is not considered by the Department in determining whether or not that individual is entitled to benefits under RCW 51.12.102?
>
> A. No. We do not look at something like that.[36]

[36] CABR 258

During the hearing of this matter, the Department acknowledged that it made no effort to determine whether Mr. Lewis would actually have been able to recover benefits under the LHWCA in the absence of any third-party settlements.[37] The Department also conceded that it would have been impossible for Mr. Lewis' LHWCA to be adjudicated to resolution in the fifteen months between his diagnosis and death.[38] Finally, the Department acknowledged that absent the any maritime work, Ms. Lewis' claim would have been approved:

> Q. [I]f Mr. Lewis had never worked at a shipyard or a maritime facility, you would have on behalf of the Department of Labor and Industries, accepted his widow's claims for benefits?
>
> A. More than likely, yes.[39]

[37] CABR 259-60
[38] CABR 268-69
[39] CABR 266

V. ARGUMENT

A. Standard of Review

The facts in this case are not in dispute and this appeal rests solely on Appellant's challenge to the Department's interpretation of RCW 51.12.102(1). Where no genuine issues of material fact exist and the only issues for review are legal questions, the Court's review is *de novo*. *Tallerday v. Delong*, 68 Wn. App. 351, 355, 842 P.2d 1023 (1993); *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 583, 925 P.2d 624 (1996). Questions of constitutional interpretation and the constitutionality of statutes are questions of law that this Court reviews *de novo*. *Optimer Internat'l v. RP Bellevue, LLC*, 170 Wn.2d 768, 772, 246 P.3d 785 (2011); *State v. Bryan*, 145 Wn. App. 353, 360, 185 P.3d 1230 (2008). Statutory interpretation is also a question of law reviewed *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 813, 16 P.3d 583 (2001). Finally, "a statute should be construed, if possible, so as to render it constitutional." *State v. Luther*, 65 Wn. App. 424,

427, 830 P.2d 674, 675 (1992) (citing *State v. Reyes,* 104 Wn.2d 35, 41, 700 P.2d 1155 (1985)).

Because Ms. Lewis is seeking widows benefits under the WIIA, the statutory presumption favoring claimants applies. RCW 51.12.010 ("This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment."); *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 8, 201 P.3d 1011 (2009) ("Any doubts and ambiguities in the language of the IIA must be resolved in favor of the injured worker . . . ."). Therefore, this Court should review the issues in this case anew and resolved all "doubts and ambiguities" in Ms. Lewis' favor.

B. The Department's Interpretation of RCW 51.12.102 Chills the Constitutional Right to Trial by Jury.

The Washington Supreme Court has made clear that the State "can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right." *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). Statutes that have a

chilling effect on constitutional rights are therefore unconstitutional. *See United States v. Jackson*, 390 U.S. 570, 581-82, 88 S. Ct. 1209 (1968); *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). In addition, regulations are unconstitutional when they have the effect of chilling exercise of constitutional rights. *See Laird v. Tatum*, 408 U.S. 1, 11, 92 S. Ct. 2318 (1972) (noting that numerous decisions of the United States Supreme Court have decided that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of [constitutional] rights").

The Washington Constitution protects a right to trial by jury in civil disputes. Const. art. 1, § 21. Specifically, article 1, section 21 states that "[t]he right of trial by jury shall remain inviolate." "For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989) (striking down a statutory cap on

economic damages because the Constitution protects the jury's role to determine damages). This right unquestionably attaches in personal injury actions, including products liability actions. *Id.* at 650-51. "Because of the constitutional nature of the right to jury trial, litigants have a continued interest in it—it simply cannot be removed by legislative action." *Id*. at 652.

Here, Richard and Diane Lewis indisputably had a constitutional right to prosecute a civil lawsuit based on Richard Lewis' terminal diagnosis of mesothelioma caused by his workplace asbestos exposure. Indeed, the Washington Legislature expressly recognized the importance of allowing terminally ill litigants such as Mr. Lewis to participate in trial:

> When setting civil cases for trial, unless otherwise provided by statute, upon motion of a party, the court may give priority to cases in which a party is frail and over seventy years of age, a party is afflicted with a terminal illness, or other good cause is shown for an expedited trial date.

Here, the Department's interpretation of RCW 51.12.102 had a chilling effect on the Lewises' rights under Article 1,

Section 21 of the Washington Constitution. Based on the Department's application of RCW 51.12.102, insulators such as Mr. Lewis must file a LHWCA claim to receive benefits under the WIIA but may not enter into any third-party settlements while their LHWCA claim is pending. However, it is undisputed that it would have been impossible to identify the responsible employer during Mr. Lewis' lifetime and highly unlikely that his LHWCA claim would have been resolved within three-years of his mesothelioma diagnosis. Accordingly, Mr. Lewis was forced to elect between exercising his constitutional right to trial by jury during his lifetime or prosecuting a Longshore claim to an uncertain conclusion that would not be resolved until long after his death.

Not only did the Department's interpretation of RCW 51.12.102 chill Mr. Lewis' freedom to exercise his constitutional right to trial by jury during his lifetime; it chills his widow's ability to pursue civil justice remedies within the three-year Statute of Limitations for third-party actions. *See*

Deggs v. Asbestos Corp. Ltd., 186 Wn.2d 716, 732, 381 P.3d 32, 40 (2016) (three-year Statute of Limitations for wrongful death claim begins to run when decedent is diagnosed with asbestos disease). In the event the Longshore claim was denied after the Statute of Limitations had elapsed, Ms. Lewis would receive no compensation whatsoever. Nevertheless, the Department's interpretation of RCW 51.12.102(1) required the Lewises to either forgo their statutory right to receive workers compensation benefits for Mr. Lewis' workplace injury or surrender their constitutional right to pursue a civil lawsuit against the non-employer entities whose negligence caused Mr. Lewis' terminal disease. The Washington Constitution does not countenance imposing such Hobson's Choices on injured workers.

The Department's interpretation is even more detrimental to constitutional principles because there was no guarantee the Lewises would receive *any* permanent benefits by forgoing their right to trial by jury. The Department's representative

admitted that if a claimant's Longshore claim is ultimately rejected, payment of ancillary benefits under RCW 51.12.102 is terminated.[40] As a result, workers entitled to benefits under RCW 51.12.102 must either relinquish their constitutional right to pursue third-party remedies and litigate their Longshore claim to an uncertain conclusion or lose their statutory right to WIIA benefits by prosecuting a tort claim. If Ms. Lewis had abstained from pursuing tort remedies during the three or more years that her widows claim was pending and the Longshore claim was ultimately rejected, the Department would have terminated her WIIA benefits and the Statute of Limitations would have lapsed on her third-party remedies. In other words, the Department's policy not only chills constitutional rights by penalizing mesothelioma victims for pursuing civil justice remedies; it creates the palpable risk that victims will be deprived of any compensation for their terminal affliction.

[40] CABR 249

C. The Department's Application of RCW 51.12.102 Violates Equal Protection.

Both the federal Constitution and Washington's own Constitution guarantee equal protection to Washington citizens under the law. Amendment XIV to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Washington's Constitution corresponds, stating that "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Const. art. 1, § 12. In other words, "both our state and federal constitutions require[] that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 760, 6 P.3d 142 (2002).

When evaluating an equal protection claim, the Court must first determine whether the individual claiming the violation is similarly situated with other persons. *State v.*

Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). A plaintiff must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). Strict scrutiny is applied when a classification affects a fundamental right or a suspect class. *State v. Harner*, 153 Wn.2d 228, 235, 103 P.3d 738 (2005). Strict scrutiny also applies when state laws impinge on personal rights protected by the Constitution. *City of Cleburne Living Ctr.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). The right to trial by jury is indisputably a fundamental right enshrined in Article I, Section 21 of the Washington Constitution; thus, strict scrutiny applies.

Under the strict scrutiny test, the Department has the burden of demonstrating that its discriminatory policy is necessary to further a compelling interest. *Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn. App. 762,

970 P.2d 774 (1999). It cannot do so here. The Department's application of RCW 51.12.102 denies an entire class of workers guaranteed state benefits. No worker who has spent time in maritime employment—which is every union insulator—may recover benefits if they also accept litigation settlements. By contrast, any worker who performs work exclusively at land-based facilities can be eligible for workers compensation benefits even if they accept settlements. No compelling reason exists for denying benefits to Washington workers with maritime and land-based exposure who file third party claims while granting benefits to similarly situated workers with only land-based asbestos exposure. The Department's interpretation of RCW 51.12.102 therefore fails under a strict scrutiny test.

Even if the rational basis test applied, the Department lacks a rational basis to discriminate between asbestos victims who accept third-party settlements solely based on whether they worked at a shipyard at some point in their career. "Under the rational relationship test, the law being challenged must rest

upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective." *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). No rational basis exists for denying to some Washington citizens WIIA benefits that are generally available.

Arguably, a policy that precludes injured workers from obtaining double recoveries from state and federal compensation programs for the same injury is both rational and appropriate. Similarly, when mesothelioma victims *actually recover* benefits under the LHWCA, it is rational for the Department to suspend WIIA payments for the same occupational disease. However, no risk of double recovery exists here because the WIIA ensures that the Department has a right to subrogation when a claimant recovers from another entity. *See* RCW 51.24.060(1)(c). Specifically, in the context of maritime asbestos exposure, RCW 51.12.102(6) provides that "[t]he amount of any third-party recovery by the worker or beneficiary shall be subject to a lien by the department." Thus,

there is absolutely no risk that Ms. Lewis would receive a double recovery as a consequence of the Department conferring benefits. Accordingly, there is no rational basis for the Department to deny WIIA benefits to asbestos victims exposed through maritime and land-based employment who are ineligible for Longshore benefits based on their acceptance of third-party settlements while granting benefits to victims who accepted third party settlements but were solely exposed on land.

D. The Department's Interpretation of RCW 51.12.102 is Inconsistent With the WIIA.

The Department's application of the WIIA suffers from fatal inconsistencies in the wording of RCW 51.12.102. The provisions of the WIIA must be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . occurring in the course of employment." RCW 51.12.010. Accordingly, courts must resolve all doubts as to the meaning of the WIIA in favor of

coverage. *See Dep't of Labor & Indus. v. Lyons Enters., Inc.*, 185 Wn.2d 721, 734, 374 P.3d 1097 (2016).

1. RCW 51.12.102 Guarantees Benefits to Asbestos Victims Who Cannot Obtain Benefits Under the LHWCA.

Originally, the WIIA did not apply to workers where a right already exists under maritime or federal compensation programs such as the LHWCA. *See* RCW 51.12.100(1); *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 34 n.5, 914 P.2d 737 (1996)). However, in enacting RCW 51.12.102, the Legislature amended the WIIA to carve out an exception for maritime workers with asbestos-related disease. Nevertheless, the Department has interpreted RCW 51.12.102(1) to provide asbestos victims with only temporary benefits while their LHWCA claim is pending which are terminated when the LHWCA claim is *either* granted or denied. This interpretation contravenes both the plain meaning of RCW 51.12.102(1) and the beneficial purpose of the WIIA.

"[T]he first rule of judicial interpretation of statutes is that the court assumes the legislature means exactly what it says." *Bremerton Pub. Safety Ass'n v. City of Bremerton*, 104 Wn. App. 226, 231, 15 P.3d 688 (2001). "When faced with a question of statutory interpretation, courts must not add words where the legislature has chosen not to include them." *State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 509, 441 P.3d 1203 (2019) (declining to read additional protection into the Washington Law Against Discrimination, which by its plain language protects patrons, not business owners). In fact, courts do not add or subtract language from a statute even if it appears the Legislature intended something else but failed to express it adequately. *Washington State Coalition for the Homeless v. Dep't of Soc. and Health Servs.*, 133 Wn.2d 894, 904, 949 P.3d 1291 (1997).

Contrary to the Department's interpretation, RCW 51.12.102(1) contains only two requirements for coverage under this section: (1) objective clinical findings

substantiate the worker's asbestos-related claim for occupational disease and (2) "the worker's employment history has a prima facie indicia of injurious exposure to asbestos fibers while employed in the state of Washington in employment covered under this title." RCW 51.12.102(1). Section 102 does not allow the Department to deny benefits. The section states only that the department "*shall* continue to pay benefits until the liable insurer initiates payments or benefits are otherwise properly terminated under this title." RCW 51.12.102(1) (emphasis added).

In denying benefits to Ms. Lewis and beneficiaries in her position, the Department has inserted a restriction into section 102 that appears nowhere in the statute. No liable insurer has initiated payment of benefits to Ms. Lewis. The Department has no justification for terminating benefits in contravention of the section. The Department denied benefits because it predicted that the Longshore claim would have been denied.

Nothing in the WIIA identifies this as a legitimate bases on which to deny benefits.

Further, no legal obstacle precludes an interpretation of RCW 51.12.102 that allows Washington workers' compensation laws to cover maritime workers who have recovered against third-party non-employers in a civil suit. State workers' compensation programs are permitted to operate coextensively with the LHWCA. *Gorman*, 155 Wn.2d at 207 (citing *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S. Ct. 2432 (1980); *Eggert*, 129 Wn.2d at 31. In other words, "[a] state may elect to extend its workers' compensation benefits to Longshore Act-covered workers." *Gorman*, 155 Wn.2d at 207. Consistently, the Washington Legislature has clearly opted to provide this supplemental relief. *See* RCW 51.12.102.

2. Long *and* Olsen *Do Not Control This Court's Decision.*

Two Washington cases, *Long v. Dep't of Labor and Indus.*, 174 Wn. App. 197, 299 P.3d 657 (2013), and *Olsen v.*

Dep't of Labor and Indus., 161 Wn. App. 443, 250 P.3d 158 (2011), involve similar facts and denied requests for similar relief. But neither case bars the relief Ms. Lewis seeks here.

"Generally, in cases where a legal issue is not discussed in an opinion, the case is not controlling on a future case where the legal issue is properly raised." *Watness v. City of Seattle*, 16 Wn. App. 2d 297, 309 n.7, 481 P.3d 470 (2021) (citing *Berschauer/Phillips Constr. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994)). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *In re Matter of Swagerty*, 186 Wn.2d 801, 809 n.1, 383 P.3d 454 (2016).

While *Long* and *Olsen* involved similar facts to the instant case, they address entirely different arguments. In *Long*, like here, the decedent's terminal mesothelioma was proximately caused by both maritime work covered by the LHWCA and non-maritime work covered by the WIIA. 174

Wn. App. at 200. Unlike in this case, however, Long asserted that she was entitled to WIIA benefits because her deceased husband's *last injurious exposure* occurred in nonmaritime employment. *Id*. *Olsen*, too, involved both maritime and non-maritime asbestos exposures. 161 Wn. App. at 447. Olsen also unsuccessfully argued that she was covered by the WIIA because on the decedent's "last injurious exposure" was during nonmaritime work. *Id*. at 451.

Neither *Long* nor *Olsen* considered constitutional challenges to the Department's interpretation of RCW 51.12.102. Thus, those courts did not address the constitutional violations and statutory construction arguments that Ms. Lewis has brought before the Court. Nor does Ms. Lewis challenge the *Long* and *Olsen* courts' application of the last injurious exposure rule. This Court should, therefore, consider Ms. Lewis' challenges through a fresh lens and not be bound by the inapposite reasoning in *Long* and *Olsen*.

E. Denying Benefits to Asbestos Victims Exposed in Both Maritime and Land-Based Employment Contravenes the Constitutional Justification on Which the WIIA is Premised.

"Washington's IIA was the product of a grand compromise in 1911. Injured workers were given a swift, no-fault compensation system for injuries on the job. Employers were given immunity from civil suits by workers." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995). The WIIA is meant to provide "sure and certain relief for workers, injured in their work, and their families and dependents . . . regardless of questions of fault and to the exclusion of every other remedy . . ." against the employer. RCW 51.04.010. In exchange for forgoing their right to sue the employer, injured workers were guaranteed to "safe" and "sure" compensation. *Id*. at 591. Washington courts have determined that the WIIA's limitation of an injured worker's civil trial rights is constitutional. *See State v. Mountain Timber Co.*, 75 Wash. 581, 135 P. 645 (1913) (noting that the Industrial Insurance Act "has abolished rights of actions and defenses, and in certain

cases denied the right of trial by jury"), *aff'd*, 243 U.S. 219, 37 S. Ct. 260 (1917). However, the WIIA was not meant to eliminate the trial rights of injured workers entirely. Instead, it replaced them with a mandatory industrial insurance scheme. It even established a cause of action for employers who intentionally injure employees. *Birklid*, 127 Wn.2d at 859.

The Department's interpretation of RCW 51.12.102 in this case contravenes WIIA's beneficial purpose by eliminating asbestos victims' "sure and certain" recovery of benefits whenever they obtain recoveries from non-employer defendant in civil litigation. When asbestos victims are denied benefits based solely on a short period of maritime employment and are still precluded from suing their employers, the "Grand Compromise" behind the WIIA is illusory.

The Department's policy does not serve the Legislature's objectives. In limiting recovery under the WIIA, the Legislature intended to prevent double recovery by workers covered under the LHWCA. *Gorman*, 155 Wn.2d at 208;

Esparza v. Skyreach Equip., *Inc.*, 103 Wn. App. 916, 938, 15 P.3d 188 (2000). The policy objective is to "protect the state's industrial insurance fund when a worker is adequately covered under the LHWCA." *Gorman*, 55 Wn.2d at 209-10 (quoting *E.P. Paup Co. v. Director; Office of Workers Comp. Programs*, 999 F.2d 1341, 1348 n.8 (9th Cir. 1993)). However, as explained *supra* § V.C, providing widows benefits to Ms. Lewis creates no risk of double recovery because the WIIA grants it a right to subrogation. Moreover, the Department acknowledged that it does not consider whether a claimant will *actually* receive compensation under the LHWCA when deciding whether to award benefits under the WIIA.[41] Indeed, the Department denied the claim *because* it determined that recovery under the LHWCA was impossible.

The Department's application of RCW 51.12.100 and RCW 51.12.102 deprives workers of compensation from either

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responsible employers or other responsible parties. Surely, this is not the intention of the WIIA. To honor the compromise between workers and Washington industry, Ms. Lewis' claim must be allowed.

VI. CONCLUSION

Because the Department's interpretation of RCW 51.12.102 contravenes constitutional protections, principles of statutory interpretation, and the very purpose of the WIIA, the Court should reverse and remand with instruction to remit benefits to Diane Lewis.

I certify that this brief contains 7,202 words in compliance with RAP 18.17(c).

Signed in Seattle, Washington on the 27th day of July 2022.

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